86-1116

Supreme Court U.S.
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NO. 86-____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

SAMUEL LEWIS, et al.,

Petitioners,

-vs-

ANTHONY LEE CHANEY,

Respondent,

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Must the district court *sua sponte* obtain and review the state court record in a 28 U.S.C. § 2254 action involving a mixed question of law and fact when there is no such requirement for *sua sponte* action for purely factual or purely legal questions?

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JUDGMENT SOUGHT TO BE REVIEWED

Petition for writ of certiorari to the United States Court of appeals for the Ninth Circuit.

The Arizona Attorney General on behalf of the State of Arizona and Samuel Lewis, Director, Department of Corrections, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 9th of October, 1986, and the Petition for Rehearing denied on the 28th of November, 1986. (Appendices A and B.)

OPINION BELOW

The Ninth Circuit's opinion held that a state habeas petitioner has the burden of providing the district court with the relevant portions of the state court record where he raises a purely factual issue, but that the district court must sua sponte seek the relevant portions of the state court record where the petitioner raises a mixed question of law and fact.

STATEMENT OF JURISDICTION

Anthony Lee Chaney appealed the order of the United States District Court for the District of Arizona denying his application for writ of habeas corpus under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit entered its opinion on October 9, 1986, and denied rehearing on November 28, 1986. This petition is timely filed within 60 days of the order denying the motion for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

AND STATUTE INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

The pertinent portion of the Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

The pertinent part of 28 U.S.C. § 2254(e):

> (e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant if able shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant because of indigency or other reason is unable to provide such part of the record, then the State shall produce such part of the record and the Federal court shall

direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

STATEMENT OF FACTS

Chaney was sentenced to death for the brutal murder of a deputy sheriff. Pursuant to Rule 31.2(b), Arizona Rules of Criminal Procedure, appeal was automatic to the Arizona Supreme Court. Because Chaney was indigent, the state supplied Chaney with an attorney and a complete record of the state court proceedings. The Arizona Supreme Court affirmed the judgment and sentence. State v. Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984).

Chaney subsequently filed a petition for writ of habeas corpus in federal district court. The same counsel who represented Chaney before the Arizona Supreme Court also represented Chaney in the federal courts. Chaney raised a combination of purely legal issues, purely factual issues, and mixed questions of law and fact. Chaney

neither provided the district court with the relevant portions of the state court record to support his petition, nor explained why he was unable to do so. The district court did not order the state to produce the state court record, and summarily dismissed Chaney's petition.

The Ninth Circuit Court of Appeals affirmed in part and remanded in part. In so doing, it held that a district court may decide purely legal issues raised in a § 2254 petition without reviewing the state court record, and affirmed the district court's resolution of the purely legal questions. It further held that a petitioner who raises purely factual issues has the burden of providing the district court with the relevant portions of the state court record or of showing his inability to do so, and affirmed the district court's dismissal of Chaney's purely factual

claims. It then held, however, that when a petitioner raises mixed questions of law and fact, the district court has the duty sua sponte to obtain and examine the state court record, and thus remanded the matter to the district court with orders for the district court sua sponte to obtain and examine the state court record.

REASONS FOR GRANTING THE WRIT

Few cases have construed the provision of 28 U.S.C. § 2254(e) that states that an applicant, if able, shall produce the part of the state court record pertinent to a determination of whether the record supports the state court's determination of a factual issue. One such case is Austad v. Risley, 761 F.2d 1348 (9th Cir.), cert. denied, ____U.S.____, 106 S.Ct. 163 (1985), which held that, since the petitioner has the burden of overcoming the § 2254(d) presumption that the state court findings are correct, the

petitioner has the concomitant duty to provide the district court with the relevant portions of the state court record. The Ninth Circuit decision in Chaney is at odds with the holding in Austad v. Risley, supra.

It does not follow that, when a petitioner presents a mixed question of law or fact to the district court, the district court itself must sua sponte seek out and obtain the relevant portions of the state court record to review this kind of issue. The Ninth Circuit has correctly stated that, when mixed questions of law and fact are concerned:

> We give deference to the state court's findings of the underlying facts, but reserve the right to give different legal weight to such facts.

Reiger v. Christensen, 789 F.2d 1425, 1428 (9th Cir. 1986). Since the federal courts give deference to state court factual findings in mixed questions, it

should be the petitioner's burden to provide the district court with the state record for mixed questions and let him argue that they should be given different legal weight.

That result is more in keeping with the holding in Austad v. Risley, supra. When factual disputes are involved, be they the presumed correct facts of a factual question or the facts of a mixed question requiring only deference under § 2254, since it is the petitioner who wants the state factual findings disturbed, it should be his burden to provide the relevant portions of that factual record to the district court when he makes his argument in the petition. At that point, the petitioner knows what in the record is relevant. The burden should not be upon the district court to sua sponte seek out the relevant facts. This would force the district court to review the

entire record to find what facts support the mixed question argument in the petition. That burden should remain upon the petitioner. He has the burden of persuasion; he should also have the burden of production.

Requiring the petitioner to supply the record where mixed questions are raised also is more in keeping with the notion of comity. Mixed questions call for deference rather than a presumption of a correctness. Yet the petitioner still wants factual findings altered, albeit only with a shifting of legal weight. He should bring those facts to the district court or explain why he is unable to do so. When the district court sua sponte requests the state court record, that is less like giving deference and more like presuming the state court's factual findings are incorrect. That runs afoul of this Court's decision in Sumner v. Mata, 449 U.S. 539 (1981).

CONCLUSION

If the provision of 28 U.S.C. § 2254(e) is to be logically construed, then a habeas petitioner, such as Chaney, who has been provided with a complete state court record, should be required to supply the district court with pertinent portions of that record when he raises either a purely factual question or a mixed question of fact and law. To require a district court, as the Ninth Circuit has done, to examine sua sponte the entire record puts the district court in the position of carrying the petitioner's burden of persuasion. This Court should therefore grant this petition and hold that the petitioner, as the moving party, has the burden of showing the alleged errors to the district court, and must do this by showing to the district court the pertinent portions of the record where the alleged errors occurred.

DATED this 29th day of December, 1986.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Chief Counsel

Attorneys for PETITIONERS

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

CRANE McCLENNEN, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon Michael V. Stuhff, 600 Valley Bank Plaza, 300 South 4th Street, Law Vegas, Nevada, 89101, Attorney for Anthony Lee Chaney, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Additionally, as a courtesy, he herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General,

Department of Justice, Washington, D.C. 20530.

DATED this 29th day of December, 1986.

CRANE McCLENNEN
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SUBSCRIBED AND SWORN to before me this 29th day of December, 1986.

JANET E. DYER
NOTARY PUBLIC

My Commission Expires:

December 10, 1989

CRM85-0978
1017d jd (DMR)

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY LEE CHANEY,	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	No. 85-2664
	)	
SAMUEL LEWIS, Director, Arizona Department of Corrections; and LLOYD E. BRAMLETT, Superintendent, Arizona State Prison,	)	DC No. CV-85-2266 WEC
	)	OPINION
	)	
Respondent-Appellee.	)	

Appeal from the United States
District Court for the
District of Arizona
Walter E. Craig, Senior District
Judge, Presiding
Argued June 10, 1986 -
San Francisco, California
Submitted August 15, 1986

BEFORE: MERRILL and CHOY, Senior Circuit Judges, and KENNEDY, Circuit Judge.

CHOY, Senior Circuit Judge:

Anthony Lee Chaney appeals the summary denial of his habeas corpus petition.

Chaney filed his petition pursuant to 28 U.S.C. § 2254 to challenge his murder conviction and death sentence. We affirm the dismissal of Chaney's purely legal claims regarding the unconstitutionality of Arizona's death penalty statute and his right to counsel in his habeas petition as well as the dismissal of his factual claims regarding juror bias and improper denial of a change of venue or restriction of venire pool because of local prejudice. We reverse the district court's summary dismissal of the remaining issues raised in Chaney's habeas petition.

FACTUAL & PROCEDURAL BACKGROUND

Chaney and a female companion entered the state of Arizona in a stolen truck. They were stopped by a Coconino County sherriff's [sic] deputy who called in a description of the truck to the dispatcher and asked Chaney for

identification. Chaney pointed a gun at the deputy while Chaney's companion removed the deputy's firearm. Chaney then handcuffed the deputy to a nearby tree and drove away.

In the meantime, the dispatcher determined that the truck Chaney was driving had been stolen and tried to so inform the deputy. When unable to do so, the dispatcher notified a second officer.

The second officer spotted Chaney's truck approaching his own patrol car along a dirt road. When Chaney saw the officer, he jumped out with his gun and fired over thirty bullets at the advancing officer's vehicle. One bullet nearly severed the officer's arm. When Chaney was nine feet behind the officer, he fired again, leaving powder burns on the victim's body. Chaney left the dying officer and drove away. The officer, a doctor and part-time deputy, was

conscious for about thirty minutes after the attack, during which time he was fully aware of his impending death.

State police apprehended Chaney after he stole another pickup truck from two boys in the area. Chaney was tried and convicted by an Arizona state court jury of first degree murder, kidnapping, aggravated assault, aggravated robbery, burglary, and theft and was sentenced to death for the murder conviction. The Arizona Supreme Court upheld the murder conviction and death sentence.

Chaney then filed a petition for writ of habeas corpus in federal district court. The district judge summarily denied Chaney's petition without conducting an evidentiary hearing. Chaney contends that the district court erred in dismissing his petition without first reviewing the state court record or conducting an evidentiary hearing.

DISCUSSION

A district court's decision on a petition for a writ of habeas corpus is reviewed de novo. Chatman v. Marquez, 754 F.2d 1531, 1533 (9th Cir.), cert. denied, 106 S. Ct. 124 (1985).

I. Applicability of Austad v. Risley

Chaney challenges the district court's summary dismissal of the claims raised in his habeas petition, including: 1) the unconstitutionality of Arizona's death penalty statute; 2) the denial of access to a compentent [sic] psychiatrist to assist in the preparation of his defense; 3) the district court's failure to appoint counsel in Chaney's petition for writ of habeas corpus; 4) improper exclusion of a juror because of her scruples about the death penalty; 5) improper denial of a change of venue or a restriction of the venire pool to exclude Flagstaff and Sedona communities

because of local prejudice; 6) improper restriction of voir dire concerning the jurors' view of the insanity defense and neurological illness; 7) violation of Chaney's right to remain silent; 8) improper restriction of Chaney's right to cross-examine a prosecution witness; and 9) the State's failure to preserve exculpatory evidence.

Chaney contends that the district court erred in summarily denying his petition without holding an evidentiary hearing or first reviewing the state court record. A district court's denial of a habeas corpus petition may not be affirmed unless the record on appeal indicates that the court independently reviewed all relevant portions of the state court record. Johnson v. Lumpkin, 769 F.2d 630, 636 (9th Cir. 1985); Rhinehart v. Gunn, 598 F.2d 557, 558 (9th Cir. 1979). The district court could not rely on the

Arizona Supreme Court's opinion as a substitute for independent review of the state court record. See Rhinehart v. Gunn, 598 F.2d at 558.

Nothing in the record on appeal indicates that the district court independently reviewed the state court record. At most, the record shows that the court reviewed Chaney's petition: "In reviewing the petition, it is determined that the Arizona Supreme Court applied the proper legal standard." However, nothing in the record shows that Chaney presented the state court record for the district court's review. The issue before us is whether the district court was obliged to obtain sua sponte and examine the state court record before ruling on Chaney's petition.

A. Factual questions.

As a threshold matter, we must determine whether the state court

findings challenged in Chaney's habeas petition are factual in nature. Austad v. Risley, 761 F.2d 1348, 1350 (9th Cir.) (en banc), cert. denied, 106 S. Ct. 163 (1985). If they are, 28 U.S.C. § 2254(d) (1982) requires a federal habeas court to accord such findings a presumption of correctness unless the petitioner establishes certain defects to overcome the presumption. Austad v. Risley, 761 F.2d at 1350. As to purely factual issues, a district court is under no duty to sua sponte obtain and review the state court record. Austad v. Risley, 761 F.2d at 1350.

A determination of a juror's partiality or bias and the extent to which pretrial publicity was prejudicial are factual determinations to which 2254(d)'s presumption of correctness applies. Patton v. Yount, 104 S. Ct. 2885, 2891 (1984); Austad v. Risley, 761 F.2d at

1350. As to these issues, therefore, Chaney had the burden of providing the district court with the relevant portions of the state court record, or of showing his inability to do so. The district court properly dismissed Chaney's challenge to these factual determinations because Chaney failed to overcome the section 2254(d) presumption.

B. Non-factual questions.

The section 2254(d) restrictions on federal court review of habeas petitions apply only to issues of fact found by state courts and not to federal court review of state court decisions regarding either purely legal questions or mixed questions of fact and law. Fendler v. Goldsmith, 728 F.2d 1181, 1190 n.21 (9th Cir. 1983).

i. Legal questions.

As to purely legal questions, review of the state court record is unnecessary.

The district court must examine the state court record only when the petition raises issues of fact, which if resolved in favor of the petitioner would entitle him to relief. See Duncan v. Carter, 299 F.2d 179, 181 (9th Cir.), cert. denied, 370 U.S. 952 (1962).

Chaney's claim that the Arizona death penalty statute is unconstitutional on its face and his claim that he was entitled to representation by counsel on his habeas petition are purely legal questions. We hold that the district court was under no obligation to obtain and examine the state court record in disposing of these issues of law.

Chaney's claim that the Arizona death penalty statute was unconstitutional as applied is arguably a mixed question of fact and law. The district court has the duty to sua sponte obtain and examine the state court record as to mixed questions

of fact and law as we have noted above. Reiger v. Christensen, 789 F.2d 1425, 1428-29 (9th Cir. 1986).

However, Chaney does not dispute the facts surrounding his killing of the deputy. He merely claims that the state court erred in its application of the statute to the facts of his case. Since Chaney's claim raises no factual issues, his challenge to the constitutionality of the Arizona death penalty statute as applied is a purely legal question. We conclude that in the circumstances of this case, the district court was under no duty to obtain and review the state court record before ruling on Chaney's claim that the statute was unconstitutional as applied.

ii. Mixed questions of fact and law.

While the district court is under no duty to obtain and examine the state court record in disposing of purely legal

questions, the court does have a duty to obtain sua sponte and review the state court record as to mixed questions of fact and law. Reiger v. Christensen, 789 F.2d at 1428-29. We conclude that the district court erred in dismissing the remainder of the claims raised in Chaney's habeas petition without first obtaining and examining the state court record.

II. Death Penalty.

Chaney challenges the constitutionality of Arizona's death penalty statute, Ariz. Rev. Stat. Ann. § 13-703(F)(6) (1982) on its face and in its application. This section provides for imposition of the death penalty if "the defendant committed the offense in an especially heinous, cruel, or depraved manner." Id. The statute is not unconstitutional on its face. Although the statutory language is broad, as any murder could be considered

cruel, heinous or depraved, the Arizona Supreme Court need not construe the statute open-endedly. See Gregg v. Georgia, 428 U.S. 153, 201 (1976) (Georgia statute imposing death penalty if murder was "outrageously or wantonly vile, horrible or inhuman in that it inolved [sic] torture, depravity of mind, or an aggravated batttery [sic] to the victim," not facially unconstitutional).

Chaney also contends that the Arizona Supreme Court has not limited sentencing discretion under section 13-703 to prevent arbitrary or capricious imposition of the death penalty. The Eighth and Fourteenth Amendments prohibit imposing capital punishment in an arbitrary or capricious manner. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart J., concurring); Gregg v. Georgia, 428 U.S. 153, 189 (1976). A state must channel the sentencer's

discretion by "clear and objective standards" Gregg v. Georgia, 428 U.S. at 198 (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974), that provide "specific and detailed guidance," Proffitt v. Florida, 428 U.S. 242, 253 (1976) (plurality), and that "make rationally reviewable the process for imposing a sentence of death," Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality).

The Arizona Supreme Court appears to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions. The court has defined each of the factors set forth in section 13-703(F)(6). See State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, 9-12, cert. denied, 461 U.S. 971 (1983) ("cruelty" involves infliction of physical and/or mental pain on victim and "depraved" and "heinous" involves

killer's state of mind). These definitions have been applied consistently. See State v. Rossi, 146 Ariz. 359, 706 P.2d 371 (1985) (en banc); State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985), cert. denied, 106 S.Ct. 898 (1986); State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985), cert. denied, 106 S. Ct. 898 (1986); State v. Martinez-Villareal, 145 Ariz. 446, 702 P.2d 670, cert. denied, 106 S. Ct. 339 (1985).

In the case at bar, the Arizona Supreme Court has affirmed a death sentence consistent with the criteria it set forth in previous decisions. The record shows that the murder was cruel. The victim was fully conscious after Chaney shot him and knew of his impending death. The victim suffered great pain before his death. The murder was heinous and depraved. Chaney shot a helpless victim from behind when

Chaney could instead have made his escape. Application of the death sentence here was not inconsistent with Arizona law, as set forth by the Arizona Supreme Court. Compare Godfrey v. Georgia, 446 U.S. 420 (1980) (death sentence invalid because circumstances of murder did not satisfy criteria laid out by state supreme court). Chaney's petition fails to establish that Arizona's death penalty statute is unconstitutional on its face or as it was applied here.

III. Right to Counsel

Chaney argues that the district court erred in failing to appoint counsel in his petition for writ of habeas corpus. In Anderson v. Heinze, 258 F.2d 479, 481 (9th Cir.), cert. denied, 358 U.S. 889 (1958), this court held that the Sixth Amendment right to counsel does not apply in habeas

corpus actions.[1] Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations. Kreiling v. Field, 431 F.2d 638, 640 (9th Cir. 1970) (per curiam);

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1 The Anderson court reasoned that a habeas peition [sic] was a civil, not criminal, proceeding, and was not within the scope of the Sixth Amendment, 258 F.2d at 481. Classification of proceedings as civil or criminal when determining whether Sixth Amendment rights apply has been criticized. See Dillon v. United States, 307 F.2d 445, 446 n.3 (9th Cir. 1962). But other justifications have been offered for excluding habeas proceedings from Sixth Amendment scrutiny, including habeas proceedings "follow the original criminal proceedings at every stage for which counsel has been provided; they are not a part of the basic processes for determining guilt; they may be resubmitted; and they are frequently frivolous." Id. (citations ommitted [sic]).

Eskridge v. Rhay, 345 F.2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996 (1966). The district court has discretion to appoint counsel for indigents when it determines "that the interests of justice so requires." 18 U.S.C. § 3006A(g) (1982).

Nothing in Chaney's petition indicates that his due process rights were violated or that the district court abused its discretion in denying Chaney's request for counsel. Nevertheless, while we cannot say that the district court erred in failing to appoint counsel given his view of the case as it was presented t [sic] him, we do feel that our holdings have now placed the case in a different posture and increased the complexities of the issues with which the district court must deal on remand. This fact, together with the fact that this is a death case, move us to conclude that, in the

interests of justice, counsel should be appointed by the district court to represent Chaney in all further proceedings.

CONCLUSION

The district court did not err in failing to obtain and review the state court record before dismissing Chaney's claims concerning juror bias or local prejudice because of pretrial publicity. Juror bias and local prejudice are factual questions to which 28 U.S.C. § 2254(d)'s presumption of correctness applies, and because Chaney did not overcome this presumption, we affirm the district court's dismissal as to these claims.

The district court was under no duty to obtain and examine the state court record before dismissing Chaney's purely legal claims concerning the unconstitutionality of Arizona's death penalty statute or his

right to representation by counsel in his habeas petition.

The Arizona statute is not unconstitutional on its face or as applied to the facts of this case. Since nothing in Chaney's petition indicates that his due process rights were violated or that the district court abused its discretion in denying Chaney's request for counsel, the district court did not err in failing to appoint counsel in Chaney's petition for writ of habeas corpus. However, given the complexities of the issues with which the district court must deal on remand, as well as the fact that this is a death case, counsel should be appointed by the district court to represent Chaney in all further proceedings.

The district court did have the duty to sua sponte obtain and examine the state court record as to mixed questions of

fact and law. We therefore reverse the district court's summary dismissal of the remaining claims raised in Chaney's petition and remand to the district court for reconsideration in light of Reiger v. Christensen, 789 F.2d 1425 (9th Cir. 1986).

AFFIRMED in part, REVERSED and REMANDED in part.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY LEE CHANEY, Petitioner-Appellant, vs. SAMUEL LEWIS, Director, Arizona Dept. of Corrections; and LLOYD E. BRAMLETT, Superintendent, Arizona State Prison, Respondent-Appellee.	)	No. 85-2664 DC No. CV-85-2266-WEC ORDER

Appeal from the United States District Court for the District of Arizona
Walter E. Craig, Senior District Judge, Presiding
Argued June 10, 1986 - San Francisco, California
Submitted August 15, 1986

BEFORE: MERRILL and CHOY, Senior Circuit Judges, and KENNEDY, Circuit Judge.

Respondents-appellee's petition for rehearing, filed on October 27, 1986, is denied.

However, the Opinion filed on October 9, 1986, in the above-entitled case is amended as follows:

1. Delete the beginning paragraph in Part I, Section B ("Non-factual questions"), page 5, line 13-1/2, and substitute the following:

> The section 2254(d) restrictions on federal court review of habeas petitions apply only to issues of fact found by state courts. Fendler v. Goldsmith, 728 F.2d 1181, 1190 n.21 (9th Cir. 1983). The presumption of correctness does not extend to federal court review of state decisions regarding either purely legal questions or mixed questions of fact and law. Id. Rather, the federal court reviews such non-factual questions de novo. Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985); see also Fendler, 728 F.2d at 1190 n.21 (federal court obliged to conduct complete and independent review of all purely legal or mixed fact and law questions raised by habeas corpus petition).

2. Delete the beginning paragraph of Part I, Section B, Sub-section ii ("Mixed questions of fact and law"), page 6, line 22-1/2, and substitute the following:

> While the district court is under no duty to obtain sua sponte and review the state court record in disposing of either purely

factual or purely legal questions, it does have such a duty as to mixed questions of fact and law. See Reiger v. Christensen, 789 F.2d at 1428-29. As mentioned above, rather than give a presumption of correctness to state court decisions on mixed questions of fact and law, a federal court reviews such decisions de novo. Butcher v. Marquez, 758 F.2d 373, 376 (9th Cir. 1985). It is obligated to conduct a complete and independent review of the state court record. See Fendler, 728 F.2d at 1190 n.21; Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985). Consequently, we conclude that the district court erred in dismissing the remainder of the claims raised in Chaney's habeas petition without first obtaining and examining the state court record.

1033d jd